CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by the California State Employees' Association concerning the Department of Corrections' unwritten statewide rule requiring departmental employees to submit to urinalysis drug and alcohol testing upon reasonable suspicion of intoxication[1]	1989 OAL Determination No. 6 [Docket No. 88-008]
	April 19, 1989
	Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2

Determination by:

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SYNOPSIS

The issue presented to the Office of Administrative Law is whether the Department of Corrections' unwritten statewide rule requiring its employees to submit to urinalysis drug and alcohol testing upon reasonable suspicion of intoxication is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the unwritten statewide rule is a "regulation" and is subject to the requirements of the Administrative Procedure Act.

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether the Department of Corrections' ("Department") unwritten[4] statewide rule requiring its employees to submit to urinalysis drug and alcohol testing upon reasonable suspicion of intoxication is a "regulation" as defined in Government Code section 11342, subdivision (b), and therefore violates Government Code section 11347.5, subdivision (a).[5]

THE DECISION [6,7,8,9]

OAL has concluded that the unwritten statewide rule set forth above is (1) subject to the requirements of the Administrative Procedure Act (APA),[10] (2) a "regulation" as defined in the APA, and (3) therefore violates Government Code section 11347.5, subdivision (a).

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

California's first--and for many years only--prison was located in the San Francisco Bay Area at San Quentin. As the decades passed, additional institutions were established, leading to an increased need for uniform statewide rules. Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.[11] The Legislature has thus entrusted the Director of Corrections with a "difficult and sensitive job",[12] namely:

> "[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein . . . ."[13]

Authority [14]

Penal Code section 5058, subdivision (a), provides in part:

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . ." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

Penal Code section 5058, subdivision (a), provides in part:

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA] . . . ." [Emphasis added.]

In any event, the APA applies to all state agencies, except those "in the judicial or legislative departments."[15] Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.[16]

General Background

To facilitate understanding of the issues presented in this Request, we will discuss pertinent statutory, regulatory, and case law history, as well as the undisputed facts and circumstances that have given rise to the present Determination.

Background: The Department's Three Tier Regulatory Scheme

The Department of Corrections was traditionally considered exempt from codifying any of its rules and regulations in the California Code of Regulations (CCR). Dramatic changes to this policy have occurred in the past 15 years, in part reflecting a broader trend in which legislative bodies have addressed "deep seated problems of agency accountability and responsiveness"[17] by generally requiring administrative agencies to follow certain procedures, notably public notice and hearing, prior to adopting administrative regulations. "The procedural requirements of the APA," the California Court of Appeal has pointed out, "are designed to promote fulfillment of its dual objectives--meaningful public participation and effective judicial review."[18] Some legislatively mandated requirements reflect a concern that regulatory enactments be supported by a complete rulemaking record, and thus be more likely to withstand judicial scrutiny.[19]

The Department has for many years used a three-tier regulatory scheme to carry out its duties under the California Penal Code. The first tier consists of the "Director's Rules," a relatively brief collection of statewide "general principles," which were adopted pursuant to the APA and are currently contained in about 200 CCR pages.

The second tier consists of the "family of manuals," a group of six "procedural" manuals containing additional statewide rules supplementing the Director's Rules. The manuals are the Classification Manual, the Departmental Administrative Manual, the Business Administration Manual, the Narcotic Outpatient Program Manual, the Parole Procedures Manual-Felon, and the Case Records Manual. Manuals are updated by "Administrative Bulletins," which typically include replacement pages for modified manual provisions.

Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, titled "Rules and Regulations of the Director of Corrections" (Title 15, Division 3, of the CCR), states in part:

> "Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures." [Emphasis added.][20]

The Departmental Administrative Manual makes clear in general that local institutions are expected to strictly adhere to the supplementary rules appearing in departmental procedural manuals, and specifically requires that local operations plans are to be consistent with the statewide procedural manuals.

According to section 102(a) of the Administrative Manual:

> "[i]t is the policy of the Director of Corrections that all institutions . . . under the jurisdiction of the Department . . . shall . . . observe and follow established departmental goals and procedures as reflected in departmental manuals . . . ." [Emphasis added.]

Section 240(c) of the Administrative Manual states:

> "While the policies and procedures contained in the procedural manuals are as mandatory as the Rules and Regulations of the Director of Corrections, the directions given in a manual shall avoid use of the words 'rule(s)' or 'regulation(s)' except to refer to the Director's Rules or the rules and regulations of another governmental agency." [Emphasis added.]

Section 242 ("Local Operational Procedures") of the Administrative Manual provides in part:

> "Each institution . . . shall operate in accordance with the departmental procedural manuals, and shall develop local policies and procedures consistent with departmental procedures and goals.
>
> "(a) Each institution . . . shall establish local procedures for all major program operations.
>
> ". . . .
>
> "(b) Procedures shall be consistent with laws, rules, and departmental administrative policy. . . ." [Emphasis added.]

These sets of rules issued by individual wardens or superintendents are known variously as "local operational procedures," "operations plans," "institutional procedures," and other similar designations.[21] We simply refer to these documents as "operations plans."

The third tier of the regulatory scheme consists of hundreds (perhaps thousands) of these "operations plans," drafted by individual wardens and superintendents and approved by the Director. These plans often repeat parts of statutes, Director's Rules, and procedural manuals.[22]

These operations plans are authorized in a duly-adopted regulation. Title 15, CCR, section 3380, subsection (c), specifically provides:

> "Subject to the approval of the Director of Corrections, wardens, superintendents and parole region administrators will establish such operational plans and procedures as are required by the director for implementation of regulations and as may otherwise be required for their respective operations. Such procedures will apply only to the inmates, parolees and personnel under the administrator." [Emphasis added.]

In this determination we are concerned with what is ostensibly a third tier rule but is in actuality a local expression of a Department-wide policy.

Background: Legislative and Judicial Actions

In the 1970's, efforts were made to require the Department to follow APA procedures in adopting its regulations. The first effort to attain this goal through the legislative process passed the Assembly in 1971, but failed to obtain the approval of the Senate Finance Committee.[23] A two-pronged effort followed. Another bill was introduced;[24] the Sacramento Superior Court was asked to order the Department to follow APA procedures. Both efforts initially succeeded. The court ordered the Department to comply with the APA; both houses of the Legislature passed the bill. However, while the bill was on Governor Reagan's desk in 1973, the California Court of Appeal overturned the trial court decision.[25] Shortly after the appellate decision, the Governor vetoed the bill.

In 1975, a third bill[26] passed the Legislature and was approved by Governor Brown.[27] In passing this third bill, the Legislature set a deadline for the Department to place its regulations in the APA:

> "It is the intent of the Legislature that any rules and regulations adopted by the Department of Corrections . . . prior to the effective date of this act [January 1, 1976], shall be reconsidered pursuant to the provisions of the Administrative Procedure Act before July 1, 1976." [Emphasis added.][28]

Prior to the July 1, 1976 deadline, the Department adopted the Director's Rules, the first tier of the regulatory scheme, into the CCR. In subsequent years, court decisions have struck down portions of the second tier--the Classification Manual[29] and parts of the Administrative Manual[30]--for

failure to comply with APA requirements.[31] OAL regulatory determinations have found the Classification Manual,[32] several portions of the Administrative Manual,[33] and two sections and Chapters 100 through 1900, noninclusive, of the Case Records Manual[34] to violate Government Code section 11347.5.

Background: This Request for Determination

On June 27, 1988, the California State Employees Association ("Requester") filed a Request for Determination with OAL challenging the Department of Corrections' unwritten statewide rule requiring Department employees to submit to urinalysis drug and alcohol testing upon reasonable suspicion of intoxication. According to two declarations[35] of Department employees, Lloyd H. Urmson and Neal Martyn, submitted by the Requester, both men were required to submit a urine sample for drug and alcohol testing[36] after a Department Lieutenant smelled a residue of marijuana on the clothing of both men as they were reporting to work at the California Correctional Center at Susanville ("CCC") on November 2, 1987.

According to the Department, the unwritten rule is based, at least partially, upon the provisions of and the authority conferred by the CCC's Operational Procedure No. 413. The Department's Response states:

> "Each institution has a local rule regarding searches of all persons, including employees. Captain Amann identified CCC's local rule as Operational Procedure No. 413 (OP)."[37]

According to an excerpt from Captain Amann's deposition in a related civil action, OP No. 413 states:

> "Search of staff, as with all persons who come on the grounds or into the institution and facilities of the department, all persons employed by the department, are subject to inspection and search of their person, property, and vehicle to the extend [sic] deemed necessary by the official in charge. Consent to search is a condition of employment which may not be withdrawn while in or on the grounds of the institution or facility of the department, Chapter 2970[38] of Administrative Manual and Article 4[39] of Chapter 2600 of the Administrative Manual which dictates staff, peace officer, and employee searches."

On January 13, 1989, OAL published a summary of this Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.[40]

On February 27, 1989, the Department filed a Response to the Request with OAL. The Department summarized its position regarding the Request as follows:

> ". . . CCC's challenged rule, restating the applicable law concerning employee drug testing, need not be adopted as a regulation. This is because it is not a rule of general application, it merely restates existing law, if it were a rule of general application then it would fall within the 'internal management' exception to the definition of 'a regulation,' or it supplements DPA's new regulations."[41]

II. DISPOSITIVE ISSUES

There are two main issues before us:[42]

(1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> " (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- a rule or standard of general application or
- a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency or
- govern the agency's procedure?

FIRST INQUIRY

The answer to the first part of the inquiry is "yes."

For an agency rule to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[43]

For the reasons listed below, we conclude that the rule applies on a statewide basis to all departmental employees. It is thus a rule "of general application." Alternatively, we conclude that the rule is "of general application" because--as the Department admits--it applies at a minimum to "all employees" of CCC, the prison located at Susanville.[44] This is sufficient to meet the "standard of general application" prong of the definition of "regulation."

The Requester alleges that the challenged departmental rule applies statewide.[45] Similarly, in its official Notice of Acceptance, OAL characterized the challenged rule as "Department of Corrections' unwritten statewide rule (requiring CDC employees to submit to drug and alcohol testing upon reasonable suspicion of intoxication)" (emphasis added).

In its Response, the Department does not directly address the question of statewide applicability, electing instead to discuss the matter solely in terms of the specific prison (CCC, Susanville) where this particular incident occurred. Admitting that CCC has "a policy of testing employees, for illegal drugs or alcohol," the Department states that the "rule concerning urine testing for CCC employees" is a "local rule affecting only CCC employees, and is therefore not department-wide nor statewide in application."

We conclude that the Department has not unequivocally denied that the challenged rule applies statewide. The Department has instead indirectly sought to narrowly focus this determination proceeding on the testing policy as applied at CCC, Susanville, in an attempt to place the rule within the "local rule" category. We have previously concluded that prison "local rules" concerning inmates need not be adopted pursuant to the APA.

Two additional factors support our conclusion that the challenged rule is a department-wide policy.

First, we note that one of CCC's local operational procedures appears to reflect a perception that a statewide policy is in effect. CCC Operational Procedure No. 413 states broadly that:

> "(a) As with all persons who come on the grounds or into the institutions and facilities of the department, all persons employed by the department, are subject to inspection and search . . . ." [Emphasis added].

Second, a recent appellate decision upheld the dismissal of a correctional officer who had refused in 1983 to "submit to a urine test and/or field sobriety test"[46] after superiors suspected that the employee was under the influence of alcohol or drugs. The California Court of Appeal, Second District, Division 2, in the 1985 case of Flowers v. State Personnel Board,[47] held that evidence the employee had refused to submit to the drug test supported a charge of insubordination. Two things are noteworthy here. Initially, we note the existence of a mandatory testing policy strikingly similar to the CCC policy. Also, it is significant that the 1983 incident occurred at a different prison--the California Rehabilitation Center (CRC) in Norco, California.

Though Flowers did not consider the question of whether the requirement that departmental employees submit to testing violated Government Code section 11347.5, the case clearly reveals that CCC is not the only "institution of the department" requiring employees to be tested.

Assuming for the sake of argument that the challenged rule were limited in scope to CCC, we nonetheless conclude that it is a rule of general application applying to all persons employed by the Department at CCC. The Department misreads OAL's decision in 1988 OAL Determination No. 13.[48]

The Department contends that this earlier determination held that "local rules affecting only one institution were not rules of 'general application' subject to Administrative Procedure Act (APA) procedures." [49] However, the Determination's holding was much narrower--for "rules applying to prisoners," OAL determined that policies applicable to one institution only were not standards of general application. OAL explicitly distinguished that from the situation where "local" rules apply to a non-prisoner group. The Determination stated:

> "We have previously found that rules applying solely to particular geographical areas of the state were nonetheless 'of general application' because the rules applied across the board to all members of 'an open class.' In the context of rules applying to prisoners, the courts have articulated a narrower standard." [Emphasis added; footnote omitted.][50]

The Response to the Request raises one additional issue that should be addressed. The Department mischaracterizes the unwritten rule in question. The Department characterizes the rule as an exercise of discretion over what constitutes the "type of individualized evidence which will trigger a test . . . ."[51] However, the unwritten rule in question is the rule requiring departmental employees to submit to urinalysis drug and alcohol testing upon reasonable suspicion of intoxication. The issue of what constitutes "reasonable suspicion" is a factual matter and is irrelevant to an analysis of whether the unwritten rule itself is a "regulation."

SECOND INQUIRY

The answer to the second part of the inquiry--concerning whether or not the challenged rule is a "regulation"--is also "yes." The rule implements, interprets or makes specific at least two statutes and one CCR provision.[52]

First, the rule implements, interprets, and makes specific Penal Code section 5058 which states in pertinent part that "The director may prescribe and amend rules and regulations for the administration of the prisons . . . ." [Emphasis added.]

Second, the Department cites Title 15, CCR, section 3270 as providing "authority for CCC's rule."[53] Section 3270 states that the requirements of inmate security and public safety take precedence over all other considerations in the operation of the Department's institutions. One mechanism to achieve inmate security and public safety is application of the unwritten rule. This application is an obvious implementation, interpretation, and making specific of section 3270.

For the foregoing reasons, OAL concludes that the unwritten rule clearly implements, interprets, and makes specific the law enforced by the Department.

WE THEREFORE CONCLUDE THAT THE CHALLENGED RULE IS A "REGULATION."

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.[54]

Government Code section 11342, subdivision (b)'s definition of "regulation" contains the following specific exception to APA requirements:

> "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency . . . ." [Emphasis added.]

The internal management exception has been judicially determined to be narrow in scope.[55] A brief review of relevant case law demonstrates that the "internal management" exception applies if the "regulation" at issue (1) affects only the employees of the issuing agency,[56] and (2) does not address a matter of serious consequence involving an important public interest.[57]

To determine if the challenged rule comes within the internal management exception involves a two-part inquiry:

> FIRST, DOES THE CHALLENGED RULE AFFECT ONLY THE EMPLOYEES OF THE ISSUING AGENCY?
>
> SECOND, DOES THE CHALLENGED RULE ADDRESS A MATTER OF SERIOUS CONSEQUENCE INVOLVING AN IMPORTANT PUBLIC INTEREST?

For the internal management exception to apply, the answer to the first inquiry must be "yes" and the answer to the second inquiry must be "no." In the instant situation, the rule applies at a minimum to the "employees" of CCC and may extend, as OAL has concluded, to all employees of the Department. Regardless of the actual scope of application, the only direct effect of the rule is upon employees of the Department of Corrections. Therefore, the answer to the first inquiry is "yes."

However, there is little doubt that the rule involves a matter of serious consequence involving an important public interest. The circumstances of and method used to test for drug and alcohol abuse by public employees, particularly those involved in protecting public safety, is an obvious matter of serious consequence involving an important public concern.[58] Indeed, the Department considers issues impacting prison security and public safety to be of paramount concern.

One regulation cited by the Department as providing "authority for"[59] the challenged rule is Title 15 CCR section 3270. Section 3270 states:

> "The primary objectives of the correctional institutions are to protect the public by safely keeping persons committed to the custody of the Director of Corrections, and to afford such persons with every reasonable opportunity and encouragement to participate in rehabilitative activities. Consistent effort will be made to insure the security of the institution and the effectiveness of the treatment programs within the framework of security and safety. Each employee must be trained to understand how physical facilities, degree of custody classification, personnel, and operative procedures affect the maintenance of inmate custody and security. The requirement of custodial security and of staff, inmate and public safety must take precedence over all other considerations in the operation of all the programs and activities of the institutions of the department." [Emphasis added.]

The fact that the Department cites the above regulation as authority for the reasonable suspicion drug testing rule is conclusive proof that the rule is intended to affect public safety and prison security. It is self-evident that a rule affecting public safety and prison security involves a matter of serious consequence involving an important public interest.

Further evidence that the unwritten rule involves a matter of serious consequence involving an important public interest is borne out by Executive Order D-58-86 which mandated the Department of Personnel Administration to adopt drug testing regulations for employees in "sensitive positions." The Governor issued the order because, among other reasons,

> ". . . the use of illegal drugs, whether on or off duty, by State employees impairs the efficiency of State departments and agencies, undermines public confidence in them, and interferes with the job performance of employees who do not use illegal drugs, and thereby increase[s] the cost of government to the taxpayers of California; . . ."[60]

In response, the Department of Personnel Administration recently adopted sections 599.960 through 599.966 of Title 2 of the California Code of Regulations, which prohibit state employees from being under the influence of drugs or alcohol while on duty and authorize reasonable suspicion drug testing of employees in "sensitive positions," including Department of Corrections employees.[61]

The fact that both the Governor and the Department of Personnel Administration have seen fit to address themselves to the issue of drug testing of state employees is further evidence that reasonable suspicion drug testing is not merely a purely parochial issue affecting one Department of Corrections' facility.

As a consequence, the challenged rule fails the second test of the "internal management" exception and is not exempt from APA requirements.[62]

WE THEREFORE CONCLUDE THAT THE CHALLENGED RULE DOES NOT FALL WITHIN THE "INTERNAL MANAGEMENT" OR ANY OTHER ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

III. CONCLUSION

For the reasons set forth above, OAL finds that the Department's unwritten statewide rule requiring departmental employees to submit to urinalysis drug and alcohol testing upon reasonable suspicion of intoxication, (1) is subject to the requirements of the APA, (2) is a "regulation" as defined in the APA, and (3) therefore violates Government Code section 11347.5, subdivision (a).

DATE: April 19, 1989

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To facilitate indexing and compilation of determinations, OAL began as of January 1, 1989 assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination is "206" rather than "1."

2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism"); Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n. 5, 211 Cal.Rptr. 758, 764, n. 5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); Boreta Enterprises, Inc. v. Department of Alcohol Beverage Control (1970) 2 Cal.3d 85, 107, 84 Cal.Rptr. 113, 128 (where agency had failed to follow APA in adopting policy statement banning licensees from employing topless waitresses, court declined to "pronounce a rule in an area in which the Department itself is reluctant to adopt one," but also noted agency failure to introduce evidence in the contested disciplinary hearings supporting the conclusion that the forbidden practice was contrary to the public welfare and morals because it necessarily led to improper conduct), vacating, (1969) 75 Cal.Rptr. 79 (roughly the same conclusion; multiple opinions of interest as early efforts to grapple with underground regulation issue in license revocation context); Carden v. Board of Registration for Professional Engineers (1985) 174 Cal.App.3d 736, 220 Cal.Rptr. 416 (admission of

uncodified guidelines in licensing hearing did not prejudice applicant); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Pacific Southwest Airlines v. State Board of Equalization (1977) 73 Cal.App.3d 32, 140 Cal.Rptr. 543 (invalidating Board policy that aircraft qualified for statutory common carrier tax exemption only if during first six months after delivery the aircraft was "principally" (i.e., more than 50%) used as a common carrier); Sangster v. California Horse Racing Board (1988) 202 Cal.App.3d 1033, 249 Cal.Rptr. 235 (Board decision to order horse owner to forfeit $38,000 purse involved application of a rule to a specific set of existing facts, rather than "surreptitious rulemaking"); Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of proper rule articulating standard by which to measure licensee's competence).

In a recent case, Wightman v. Franchise Tax Board (1988) 202 Cal.App.3d 966, 249 Cal.Rptr. 207, the court found that administrative instructions promulgated by the Department of Social Services, and requirements prescribed by the Franchise Tax Board and in the State Administrative Manual--which implemented the program to intercept state income tax refunds to cover child support obligations and obligations to state agencies--constituted quasi-legislative acts that have the force of law and establish rules governing the matter covered. We note that the court issued its decision without referring to either:

(1) the watershed case of Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, which authoritatively clarified the scope of the statutory term "regulation"; or

(2) Government Code section 11347.5.

The Wightman court found that existence of the above noted uncodified rules defeated a "denial of due process" claim. The "underground regulations" dimension of the controversy was neither briefed by the parties nor discussed by the court. [We note that, in an analogous factual situation involving the intercept requirements for federal income tax refunds, the California State Department of Social Services recently submitted to OAL (OAL file number 88-1208-02) Internal Revenue Service (IRS) Tax Refund Intercept Program regulations. These regulations were approved by OAL and filed with the Secretary of State on January 6, 1989, transforming the ongoing IRS intercept requirements from administrative directives into formally adopted departmental regulations.]

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index (see note 50, infra).

See also, the following Opinions of the California Attorney General, which concluded that compliance with the APA was required in the following situations:

> Administrative Law, 10 Ops.Cal.Atty.Gen. 243, 246 (1947) (rules of State Board of Education); Workmen's Compensation, 11 Ops.Cal.Atty.Gen. 252 (1948) (form required by Director of Industrial Relations); Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56 (1956) (Department of Industrial Relations rules governing electrical wiring in trailer parks); Los Angeles Metropolitan Transit Authority Act, 32 Ops.Cal.Atty.Gen. 25 (1958) (Department of Industrial Relations's State Conciliation Service rules relating to certification of labor organizations and bargaining units); Part-time Faculty as Members of Community College Academic Senates, 60 Ops.Cal.Atty.Gen. 174, 176 (1977) (policy of permitting part-time faculty to serve in academic senate despite regulation limiting service to full-teachers). Cf. Administrative Procedure Act, 11 Ops.Cal.Atty.Gen. 87 (1948) (directives applying solely to military forces subject to jurisdiction of California Adjutant General fall within "internal management" exception); Administrative Law and Procedure, 10 Ops.Cal.Atty.Gen. 275 (1947) (Fish and Game Commission must comply with both APA and Fish and Game Code, except that where two statutes are "repugnant" to each other and cannot be harmonized, Commission need not comply with minor APA provisions).

3 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121, subsection (a) provides:

> "'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]." [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4 The fact that the Department's reasonable suspicion drug testing policy is an unwritten rule does not preclude it from being a "regulation" subject to the provisions of the APA. As OAL stated in 1986 OAL Determination No. 6 (Bay Conservation and Development Commission, September 3, 1986, Docket No. 86-002) California Administrative Notice Register 86, No. 38-Z, September 19, 1986, p. B-18, B-27; typewritten version p. 14:

> "To address the simpler deficiency first, we note that 'underground regulations' need not be written. A regulatory policy could conceivably be communicated solely in telephone or personal conversations. Thus, the above interpretation is underinclusive in that it fails to include oral communications."

5 Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

6 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." [Emphasis added.]

7 Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 and 125. The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

On February 27, 1989, OAL received a Response to the Request for Determination from the Department of Corrections, which was considered in making this Determination.

8 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

9 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of

this Determination.

10 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL for the purchase price of $3.00.

11 Penal Code section 5000.

12 Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778, 781.

13 Penal Code section 5054.

14 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file

comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

15 Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346, and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

16 See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities; see Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

17 California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.

18 Id.

19 For instance, Government Code section 11346.7, subdivision (b) requires a "final statement of reasons" for each regulatory action.

20 This language first appeared in the CCR in May of 1976. (California Administrative Notice Register 76, No. 19, May 8, 1976, p. 401.) The Preface, and the quotation, were printed in the CCR in response to the legislative requirement stated in section 3 of Statutes of 1975, chapter 1160, page 2876 (the uncodified statutory language accompanying the 1976 amendment to Penal Code section 5058). As shown by the

dates, this language was added to the CCR prior to the decision in Armistead v. State Personnel Board ((1978) 22 Cal.3d 198, 149 Cal.Rptr. 1) and subsequent case law, prior to the creation of OAL, and prior to the enactment of Government Code section 11347.5.

21 See Administrative Manual section 242(d).

22 The Department is currently in the process of reviewing all existing procedural manuals and operations plans, with the objective of (1) transferring all regulatory material from manuals into the CCR, (2) combining all six existing manuals into a single more concise "Operations Manual," and (3) eliminating the duplicative material in the local "operations plans," while retaining in these plans material concerning unique local conditions.

23 AB 1270(Sieroty/1971).

24 SB 1088(Nejedly/1973).

25 American Friends Service Committee v. Procunier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.

26 All three bills also concerned the Adult Authority (now the Board of Prison Terms). We will not discuss that facet of the legislation.

27 AB 1282(Sieroty/1975).

28 Section 3 of Statutes of 1975, chapter 1160, page 2876.

29 Stoneham v. Rushen (Stoneham I) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen (Stoneham II) (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20.

30 Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.

31 These adverse decisions concerning regulatory "second tier" material have not been unexpected. The author of the successful 1975 bill rejected an amendment proposed by the De-

partment which would have specifically excluded the statewide procedural manuals from the APA adoption requirement. Later, a Youth and Adult Correctional Agency bill analysis dated May 5, 1981, unsuccessfully opposed AB 1013, the bill which resulted in the enactment of Government Code section 11347.5. This analysis contained a warning that the proposed legislation "could result in a great part of our [i.e., Department of Corrections'] procedural manuals going under the Administrative Procedure Act process . . . ."

32 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-74.

33 1987 OAL Determination No. 15 (Department of Corrections, November 19, 1987, Docket No. 87-004), California Administrative Notice Register 87, No. 49-Z, December 4, 1987, p. 872 (sections 7810--7817, Administrative Manual); 1988 OAL Determination No. 2 (Department of Corrections, February 23, 1988, Docket No. 87-008), California Regulatory Notice Register 88, No.10-Z, March 4, 1988, p. 720 (chapters 2900 and 6500, sections 6144, Administrative Manual); 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, p. 1682 (Chapter 7300, Administrative Manual).

Portions of the above noted chapters and sections were found <u>not</u> to be "regulations."

34 1988 OAL Determination No. 19 (Department of Corrections, November 18, 1988, Docket No. 87-026), California Regulatory Notice Register 88, No. 49-Z, December 2, 1988, p. 3850 (subsections 1002(b) and (c), and 1053(b) of the Case Records Manual were found to be regulatory; subsections 1002(a) and (d), and 1053(a) were found not to be regulatory). 1989 OAL Determination No. 3 (Department of Corrections, February 21, 1989, Docket No. 88-005), California Regulatory Notice Register 89, No. 9-Z, March 3, 1989, p. 556 (Chapters 100 through 1900, noninclusive, of the Case Records Manual were found to be regulatory except for those sections which were either nonregulatory or were restatements of existing statutes, regulations, or case law).

35 The declaration of Lloyd H. Urmson dated January 20, 1988, and the declaration Neal Martyn dated March 25, 1988, were apparently prepared in connection with a related civil suit filed on behalf of both employees by the Requester against the Department as well as other defendants. That suit is captioned:

CALIFORNIA STATE EMPLOYEE ASSOCIATION (CSEA), LOCAL 1000, SEIU, AFL-CIO, CLC, on behalf of itself and its affected members, LLOYD H. URMSON, JR., and NEAL MARTYN, Plaintiffs

vs.

STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT WILLIAM MERCKLE; CAPTAIN JOHN AMANN; LIEUTENANT J. SCHROERS; AND DOES I THROUGH XX, INCLUSIVE. Defendants.

The suit was filed in the Sacramento County Superior Court, Action No. 501702. At the time of the urinalysis testing, Mr. Urmson and Mr. Martyn were both employed as a Supervising Cook I at the California Correctional Center at Susanville, California.

On June 2, 1988, the Superior Court denied plaintiffs' motion for a preliminary injunction barring use of the urine test for drugs. One of the grounds cited by the court in its order was the court's conclusion that the testing "did not violate the California Administrative Procedure Act because it falls within the 'internal management' exception, . . ." Because OAL was not a party to the action and because OAL is required by Government Code 11347.5 to make its own determination of whether the unwritten rule is a "regulation," OAL is not bound by the court's conclusion. For the reasons set forth in the text in the discussion of the "internal management" exception, infra, OAL has determined that the internal management exception does not apply to the unwritten rule because of the holdings in Poschman v. Dumke (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596 and Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1.

36 On December 7, 1987, the Department informed Mr. Urmson and Mr. Martyn that both urinalysis tests were negative for any drug or alcohol use by either man.

37 Department's Response, p. 1.

38 Chapter 2970 of the Administrative Manual states:

"Section 2971. Searching of Employees.
(a) As with all persons who come on the

grounds or into the institutions and facilities of the department, all persons employed by the department are subject to inspection and search of their person, property and vehicles, to the extent deemed necessary by the official in charge. Consent to search is a condition of employment which may not be withdrawn while in or on the grounds of an institution or facility of the department.

(b) It is the responsibility of the appropriate supervisor/administrator to inform each new employee of departmental consent to search policy.

(c) An employee may be subjected to a more intensive search than is normally required when the official in charge has good reason to belive [sic] the employee is involved in the unauthorized or unlawful possession or movement of anything into or out of an institution or facility of the department. Such an intensive search may include the employee's person, vehicle, and any locker, desk or storage space assigned to or used by the employee.

(d) When the intensive search includes the employee's assigned locker, desk or storage space provided by the department, it shall be searched in the employee's presence, or with his/her consent, or with prior notification that a search will be conducted, or after a valid search warrant has been obtained. Whenever possible the employee shall be present during the search.

(e) When an employee is subjected to a more intensive search than is normally required, the employee shall be informed of the reason for the search and of the name of the official ordering the search before the search begins.

(f) Any search of an employee's person which involves the touching of the employee's clothed body or visual inspection of the employee's unclothed body shall be conducted in private and out of the sight and hearing of other employees and inmates. Such searches shall only be conducted, observed and supervised by officials of the same sex as the employee.

(g) An intensive search of an employee's person, property or vehicle shall be conducted by not less than two officials, at least one of whom shall be of a supervisory rank to assume official responsibility for the search.

(h) The intensive search of an employee's person, property or vehicle shall be verbally reported to the administrator of the institution or facility or to the duty officer immediately upon completion of the search. This shall be followed with a written report to the administrator and an incident report to the director if the search discloses or confirms any suspected criminal activity."

39 Article 4 of Chapter 2600 of the Administrative Manual is entitled "Employee Rights: Peace Officers Bill of Rights."

40 California Regulatory Notice Register 89, No. 2-Z, p. 89.

41 Department's Response, p. 5.

42 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

43 Roth v. Department of Veterans Affairs (1980) 110 Cal. App.3d 622, 127 Cal.Rptr. 552.

44 Department's Response, p. 1.

45 Letters dated January 13, 1988, June 27, 1988, February 8, 1989, and February 14, 1989.

46 174 Cal.App.3d 753, 757, 220 Cal.Rptr. 139, 141.

47 174 Cal.App.3d 753, 220 Cal.Rptr. 139.

48 (Department of Corrections, August 31, 1988, Docket No. 87-019) California Regulatory Notice Register 88, No. 38-Z, September 16, 1988, p. 2944.

49 Department's Response, p. 2.

50 See note 48, supra, p. 2960; typewritten version, p. 17.

51 Department's Response, p. 2.

52 The unwritten rule implements, interprets or makes specific the following statutes and regulation:

Penal Code section 5058
Government Code section 3303
Title 15 CCR section 3290.

All of the above references, except for Penal Code section 5058, were cited by the Department in its Response as related to or sources of authority for the reasonable suspicion urinalysis drug testing conducted by the Department in the Urmson and Martyn case. See Department's Response, pp. 1-4.

The Department also in effect concedes that the challenged rule "supplements" the recently adopted Department of Personnel Administration regulations generally governing drug testing of state employees. See Title 2, CCR, sections 599.960--966. (Response, p. 5.)

53 Department's Response, p. 4.

54 The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Kaaren Morris), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $108.

55 See Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1; Stoneham v. Rushen (Stoneham I) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Poschman v. Dumke (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596; 1987 OAL Determination No. 13 (Board of Prison Terms, September 30, 1987, Docket No. 87-002) California Administrative Notice Register 87, No. 42-Z, October 16, 1987, pp. 451-453, typewritten version pp. 7-9.

56 Id., Armistead, Stoneham I, and Poschman. See also 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, p. B-13; typewritten version, p. 6.

57 See Poschman, note 55, supra, 31 Cal.App.3d at 943, 107 Cal.Rptr. at 603; and Armistead, note 55, supra, 22 Cal.3d at 203-204, 149 Cal.Rptr. at 3-4. See also 1989 OAL Determination No. 5 (Department of Corrections, Docket No. 88-007), California Regulatory Notice Register, No. 23-Z, April 21, 1989, pp. 1120, 1126-1127; typewritten version, pp. 192-193.

58 Two recent United States Supreme Court cases considered the issue of the constitutionality of drug testing of (1) United States Customs Service employees and (2) railway workers involved in certain train accidents. In Nat'l Treasury Employees Union v. Raab (March 21, 1989) 89 Daily Journal D.A.R. 3645, the Supreme Court held that the Customs Service's urinalysis testing of employees applying for promotion to positions directly involving the interdiction of illegal drugs or to positions requiring firearms was permissible despite the absence of a requirement of probable cause or of some level of individualized suspicion. In Skinner v. Railway Labor Executives Assn. (March 21, 1989) 89 Daily Journal D.A.R. 3654, the Supreme Court held that Federal Railroad Administration regulations requiring railroads to conduct blood and urine tests of covered employees involved in major train accidents were permissible even without the requirement of a search warrant or reasonable suspicion of impairment.

Neither case analyzed the constitutionality of a testing scheme similar to the reasonable suspicion urinalysis testing employed in the instant case. Both cases, however, illustrate the important public interest involved in drug testing of certain categories of public employees.

59 Department's Response, p. 4.

60 Governor's Executive Order D-58-86 dated September 24, 1986, p. 1.

61 Title 2 CCR section 599.960. OAL makes no finding on the issue of preemption of the Department's unwritten reasonable suspicion drug testing rule following adoption of the DPA regulations. Because the DPA regulations were adopted subsequent to the application of the unwritten rule in the instant case, the issue of preemption or supersession is irrelevant to the finding in this Determination that the unwritten rule is an "underground regulation" which is unenforceable absent adoption pursuant to APA requirements.

62 The Department does not contend that any of the other exceptions to APA requirements apply to the unwritten rule in question. OAL agrees with this analysis.

63 We wish to acknowledge the substantial contribution of Unit Legal Assistant Kaaren Morris and Senior Legal Typist Tande' Montez in the preparation of this Determination.